IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

NO. 77-1056

SUNBEAM TELEVISION CORPORATION and
THE MIAMI HERALD PUBLISHING COMPANY,

Appellants,

vs.

ROBERT L. SHEVIN, as Attorney General, and
JANET RENO, as State Attorney,

Appellees.

On Appeal from the Supreme Court of Florida

BRIEF IN SUPPORT OF MOTION TO DISMISS OR TO AFFIRM

ROBERT L. SHEVIN
ATTORNEY GENERAL

JAMES D. WHISENAND
DEPUTY ATTORNEY GENERAL

THOMAS A. BEENCK
ASSISTANT ATTORNEY GENERAL

The Capitol
Tallahassee, Florida 32304

ATTORNEYS FOR APPELLEES

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, the Appellees file this motion to dismiss the appeal on the ground that it does not present a substantial federal question, or in the alternative, to affirm the judgment of the Supreme Court of Florida on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTES

The existing Section 934.03(2)(d), Florida Statutes, requires all parties to a defined oral or wire communication to give prior consent to a defined interception of that communication:

> It is lawful under this chapter for a person to intercept a wire or oral communication when all of the parties to the communication have given prior consent to such interception. §934.03(2)(d)

This section is refined by the following definitions:

> 934.02 Definitions.--As used in this chapter:
> (1) "Wire communication" means any communication made in whole or in part through the use of

facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications;

(2) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting;

(3) "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device;

These statutes apply when a party to the oral or wire communication has an "expectation of privacy."

B. THE PROCEEDINGS BELOW

Appellant Sunbeam Television Corporation broadcasts on Channel 7 [WCKT] with its principal place of business in Miami, Florida. Appellant Miami Herald Publishing Company is a division of Knight-Ridder

Newspapers, Inc., which publishes The Miami Herald a newspaper of general circulation in the State of Florida.

The Complaint filed by Sunbeam Television Corporation contained allegations that Section 934.03(2)(d), Florida Statutes, impaired its newsgathering and dissemination activities. This "impairment" allegedly constituted a prior restraint in violation of the First Amendment. Sunbeam alleged that it is necessary to secretly record communications made during its reporters' investigative reporting activities. The secret recordings were alleged to be necessary to insure the accuracy of the information gathered and to preserve the conversations. Sunbeam alleged that the interests protected by Section 934.03(2)(d), Florida Statutes, were generalized interests in privacy which are subordinate to their alleged First Amendment rights. The Miami Herald intervened as a party Plaintiff.

Appellants-Plaintiffs presented seven witnesses at the January 7, 1977, hearing that testified about their newsgathering activities. Appellants-Plaintiffs also introduced into evidence six video tapes depicting actual investigative reports on housing discrimination, unnecessary abortions, automobile repair, lost wallets, automobile air conditioner repairs, and automobile transmission repairs. The video tapes were identified and explained by Gene Strul and Bob Mayer.

The Appellants'-Plaintiffs' witnesses testified that when they became aware of the Section 934.03(2)(d), Florida Statutes,

requirements restricting secret recordings that they complied with the law. Prior to becoming aware of the law, the witnesses utilized secret recordings in investigative reporting interviews where they represented themselves as individuals seeking the services of the investigated person. The stated purpose for using secret recordings was to corroborate the reporter's story, ensure accuracy, avoid lawsuits, develop information, make the story more dramatic, effectiveness was not the same, and concealment of identity.

The witnesses testified that alternative investigative techniques were available but that secret tape recordings were preferred. Substitutes suggested by the witnesses were: transcribing or note taking; relying on records to corroborate statements; accompanying public officials; interviewing public officials; interviewing victims; using two reporters to corroborate; using another individual from the Better Business Bureau; and using "60 Minutes" technique of recording conversation of only the undercover reporter.

Investigative reporting has been conducted by the witnesses since October 1, 1974, without using secret recorders. The video tape investigative report entitled "Not on the Menu" was conducted in this manner. Another entitled "Not on the Blueprint" involved an investigation of building code violations in Dade County. An investigation of high medical bills, "Not on the Prescription," was also conducted without secret recording. An investigation of attorneys allegedly swindling clients and operations of local bail bondsmen were also investigated without secret recordings.

Based upon this synopsis of the facts and the full testimony presented, the trial court concluded that irreparable injury to the Plaintiffs' rights existed. Each witness testified that they or individuals conducting investigative reporting activities at their direction had ceased using secret tape recordings in late 1974 or early 1975--a period of over two years ago--but that investigative reporting was still being conducted.

The trial court entered a temporary injunction that: enjoined the enforcement of Section 934.03(2)(d), Florida Statutes; declared Section 934.03(2)(d), Florida Statutes, unconstitutional as a prior restraint upon newsgathering activities in violation of the First Amendment; and declared Section 934.03(2)(d), Florida Statutes, unconstitutional as void for vagueness. The Appellees-Defendants filed an interlocutory appeal to the Florida Supreme Court. The Florida Supreme Court quashed the interlocutory orders entered by the trial court and found Section 934.03(2)(d), Florida Statutes, constitutional.

II.

ARGUMENT

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION WARRANTING REVIEW BY THIS COURT.

The protection of a person's general right to privacy is left largely to the States. Katz v. United States, 389 U.S. 347, 350 (1967); Whalen v. Roe, ___U.S.___,

51 L.Ed.2d 64 (1977). This state responsibility was again described in Cox Broadcasting Corp., Inc. v. Cohn, 429 U.S. 469 (1975):

> If there are privacy interests to be protected in judicial proceedings, the State must respond by means which avoid public documentation or other exposure of private information. 420 U.S. at 496.

Section 934.03(2)(d), Florida Statutes, is a legislative implementation of the obvious legislative authority which includes the authority to ascertain whether certain oral communications deserve privacy protection. Gelbard v. United States, 408 U.S. 41, 51 (1972); Branzburg v. Hayes, 408 U.S. 665, 697 (1972); Rowan v. United States, 397 U.S. 728, 736, 738 (1970); Time, Inc. v. Hill, 385 U.S. 374, 385, n. 9 (1967); Rathbun v. United States, 355 U.S. 107 (1957); Laird v. Florida, 342 So.2d 962 (Fla. 1977); State v. News-Press Publishing Co., 338 So.2d 1313 (2 DCA Fla. 1976).

The First Amendment rights of the Appellants-Plaintiffs to gather news, through the use of cameras and electronic recording devices, are subject to reasonable restrictions that afford protection to the rights of others. Estes v. Texas, 381 U.S. 532 (1965); United States v. Gurney, 558 F.2d 1202 (5 Cir. 1977), petition for certiorari filed January 16, 1978, No. 77-1010; Garrett v. Estelle, 556 F.2d 1274 (5 Cir. 1977), petition for certiorari filed December 20, 1977, No. 77-884; Sunbeam Television Corp. v. Shevin, 351 So.2d 723

(Fla. 1977). This Court has rejected similar media challenges to "access limitations." In Pell v. Procunier, 417 U.S. 817 (1974), this Court upheld a prison regulation that limited media access to prisons and to inmates:

> More particularly, the media plaintiffs assert that, despite the substantial access to California prisons and their inmates afforded representatives of the press--access broader than is afforded members of the public generally--face-to-face interviews with specifically designated inmates is such an effective and superior method of newsgathering that its curtailment amounts to unconstitutional state interference with a free press. We do not agree. 417 U.S. at 833.

A like result was reached in Saxbe v. Washington Post Co., 417 U.S. 843 (1974). The record in Saxbe contained exhaustive testimony by six witnesses that testified that personal interviews were "indispensable to effective reporting." Saxbe v. Washington Post Co., 417 U.S. 854, n. 5. One witness testified that his experience with 1,600 interviews clearly illustrated that the truth could only be gained from private one-to-one interviews. With this factual predicate the Court declined to accept any First Amendment violation asserted by the media:

> The Court rejects this claim on the ground that 'newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.' Pell v. Procunier, 417 U.S. at 834, 41 L.Ed.2d, at 508. It is said that First Amendment protections for newsgathering by the press reach only so far as the opportunities available for the ordinary citizen to have access to the source of news. 417 U.S. at 856 (J. Powell dissenting).

The Appellants'-Plaintiffs' right to publish does not carry with it the unrestrained right to gather news. Zemel v. Rusk, 381 U.S. 1 (1964). Section 934.03 (2)(d), Florida Statutes, does not constitute a prohibited prior restraint. Nebraska Press Assoc. v. Stuart, 427 U.S. 539, (1976); CBS, Inc. v. Lieberman, 439 F.Supp. 862 (N.D. Ill. 1976), dismissed by stipulation on October 14, 1977. Appellants-Plaintiffs have no constitutional right to conduct investigative news reporting activities through electronic recording devices operated contrary to Section 934.03 (2)(d), Florida Statutes. Dietemann v. Time, Inc., 449 F.2d 245 (9 Cir. 1971); Sigma Delta Chi v. Speaker, Maryland House of Delegates, 310 A.2d 156 (Md. App. 1973). Appellants-Plaintiffs have not raised a substantial federal question warranting review by this Court.

CONCLUSION

Section 934.03(2)(d), Florida Statutes, was enacted to protect the privacy interests of parties to a defined oral or wire communication. This statute does not violate the Appellants'-Plaintiffs' First Amendment rights. This case does not present a substantial federal question and should be dismissed or affirmed.

Respectfully submitted,

ROBERT L. SHEVIN
ATTORNEY GENERAL

JAMES D. WHISENAND
DEPUTY ATTORNEY GENERAL

THOMAS A. BEENCK
ASSISTANT ATTORNEY GENERAL

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304
904/488-2595

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion to Dismiss or to Affirm were served by U.S. Mail upon the following: Parker D. Thomson, Esq., Paul & Thomson, 1300 Southeast First National Bank Building, Miami, Florida 33131; Allan Milledge, Esq., Alan Rosenthal, Esq., Milledge & Hermelee, 2699 South Bayshore Drive, Miami, Florida 33133; Thomas K. Peterson, State Attorney's Office, Eleventh Judicial Circuit, 1351 N.W. 12th Street, Miami, Florida 33125; and Thomas W. McAliley, Beckham, McAliley and Proenza, Fifth Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130, this 24th day of February, 1978.

James D. Whisenand